IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, APPELLEE

Supreme Court No. 33453

HAROLD LEE CYRUS, APPELLANT.

APPELLANT'S BRIEF

COMES NOW your Appellant, Harold Lee Cyrus, and by way of an Appellant's Brief states the foregoing recital of fact and law:

TYPE OF CASE AND NATURE OF RULING BELOW

This is an appeal from an Order of the Circuit Court of Mercer County, West Virginia adjudicating Appellant, guilty of four (4) felony offenses of a twenty-three (23) Count Indictment.

Those convictions include two (2) Counts of Sexual Abuse by a Custodian (Counts 19 and 22) and two (2) Counts of Incest (Counts 20 and 23).

Counts 1,3,6,7,8,9,10 and 11 were dismissed by the Circuit Court on motion of the Appellant at the conclusion of the state's case in chief.

The jury found the Appellant not guilty of Counts 3,4,5,12,13,14,15,16,17 18 and 21.

Your Appellant was sentenced by the Circuit Court to an indeterminate sentence of 20 to 50 years in the state penitentiary.

STATEMENT OF FACT

Appellant, Harold Lee Cyrus, was charged with a twenty-three (23) count indictment returned by the October 2005 term of the Mercer County Grand Jury.

These offences included Six (6) Counts of Sexual Assault, First Degree (Counts 1,3, 6 9, 12 and 15); Eight Counts of Sexual Abuse by a Custodian (Counts 2,4, 7, 10, 13, 16,19 and 22); Seven Counts of Incest (Counts 5, 8, 11, 14, 17, 20 and 23) as well as Two (2) Counts of Sexual

Assault Third Degree (Counts 18 and 21).

The Indictment alleges there were two victims K.S. & V.C. and the Appellant was not convicted of any charges relating to V.C.

The evidence adduced at trial shows there was no physical or forensic evidence linking the Appellant to the alleged acts nor were there any witnesses to corroborate the testimony of K.S.

Ultimately, Appellant was convicted solely on the testimony of K.S., that despite the fact that a medical report from Dr. Gregory Wallace dated January 31, 2002, (Appellant's Exhibit No. 1) found no evidence of sexual activity, as well as an intact hymen, in addition the alleged victim previously stated in writing and under oath in a previous proceeding that nothing ever happened (Appellant's Exhibit 2-5; Transcript pages 263-270).

The Appellant was found not guilty of all counts of sexual assault that went to the jury, and yet was convicted of incest (WV Code § 61-8-12) which requires sexual intrusion or sexual intercourse. Certainly the verdict on the incest counts should not be sustained when there was no guilty verdict on any sexual assault charges.

The Circuit Court also allowed testimony of other crimes wrongs or acts for which the Appellant was not indicted and did not occur in Mercer County in violation of Rule of Evidence 404, as well as evidence of an abuse and neglect proceeding when several children were removed from Appellant's home.

The State gave no notice of it's intention to introduce this evidence, prior to trial, and there was no "in camera" hearing to address the matters other than brief bench conferences. Indeed the Circuit Court stated as follows: (Transcript pg 13-19) and (Transcripts page 330-332)

THE COURT: I'm a little uncomfortable in getting into this prior proceeding, you know I'm afraid it may suggest to the jury that the Judge has already made this– this finding and I'm not sure of the relevance, or if so if it outweighs any–any prejudice here?

THE COURT: You can do that but don't get into the termi- -whether the rights were terminated, - -

THE COURT: - - Or whether the Court made a finding of termination.

THE COURT: Okay, again I think you need to stay away from that, but- -

THE COURT: You may proceed.

The next question by the State's Prosecuting Attorney, Deborah Garton was:

Q. At the - - you're familiar with the - - a termination proceeding in child abuse and neglect, were you present at Kimberly Stevenson's?

(Answers by Krystal Leedy, worker with Child Protective Services)

A. Yes.

Q. Okay, at - - and you were present when she took the stand?

A. Yes.

Q. Okay did she tell the Court that she had been the victim of sexual abuse?

A. Actually, the proceedings where she took the stand was in a - - was at the adjudication and not the termination.

Q. Oh, okay, my - - I'm usin' the wrong term, but it was the same sort of process?

A. Yes.

Just prior to the bench conference Ms. Leedy described her occupation as follows in direct examination: Transcript page 327:

Q. Okay what does a Child Protective Service worker do?

A. My job is a - - I work with Child Protective Services case management aspect so I work with cases where there has already been an investigation done where there has been abuse or neglect substantiated in the home regarding children, and then I work in the home to help provide services to that family and to those children to insure safety and to help the family.

By this point in the trial the jury was already aware that several children had been removed from the home, as shown by the following testimony (transcript pages 298-299.)

(Answers by Shannon Beck, counselor)

Q. Okay, and is that how you came to counsel Kimberly Stevenson?

A. Yes, she- - she came to be - - she was removed from the home and placed in one of our foster homes and I was her foster care case management manager as well as her therapist because I have the

credentials to provide individual therapy, and her Child Protective Service Worker at that time, Krystal Leedy, and her attorney at that time, Kate Haas, both asked that she received individual therapy.

Q. Okay what is a case management supervisor?

A. A case manager, what they do is when the child comes into the home they, basically, look at the child and complete an assessment and determine what it is this child needs, why they're in foster care, and we insure that all their physical and emotional needs are being met while they're there, that means if they need doctors, if there's a specific issue physically we have to get them to doctors to do that, if there's something emotionally going on we have the- - we have to provide the services for that, so whatever that child needs while they're in care, in foster care, it was my responsibility to make sure she- - she- - her needs were met, to work with the foster parent, the CPS worker, the attorneys, who's ever involved with this child then these are the issues, what does she need, it's my role to help her get those needs met.

Q. And when she first came there and she was first in foster care her - - the parental rights had not been terminated, is that right?

Here the State's attorney is clearly suggesting that termination had occurred in violation of Trial Court's ruling just previously given and was done in a most devious manner

A. That's correct.

Q. Okay now- - and that's - - the last resort, terminating someone's parental rights is absolutely the last resort, okay, so she's removed from the home and placed in foster care and then you are responsible for identifying her needs, and what- - and at that time she still has contact with her mother and her- - and when she's in foster care part of that time she's with her siblings?

A. Yeah, hum-hum.

These matters should have been properly noticed to the defense well prior to trial and the defense further given the opportunity to for a proper "in camera" hearing and not have such issues thrust upon them in the heat of trial.

The defense in a discovery motion and a pretrial hearing held on April 6, 2006 made just such a request.

MR. SMITH: - - which brings me to the next matter, Your Honor, like I say we're not exactly sure who they're calling the State has never formally disclosed any experts as required by I think it's Rule - - Rule 16 despite our request for the same. Now in this case, as the Court can tell from this report, there are recantations involved, there's several of them, we have transcripts from the - - K.S. took the witness stand, I think in this courtroom, and recanted that anything happened, under oath.

THE COURT: So you got that, you got those transcripts through the abuse and neglect cases?

MR. SCANTLEBURY: Yes, we have those.

MR. SMITH: So we have those transcripts. Now I don't know if the State intends to proffer any expert testimony upon recantations, but as the fact that we are now within a week of trial and they have not identified any witnesses to give any such expert testimony as to recantations we would object to any expert testimony as far as recantations goes, and we would further base the basis not only upon nondisclosure under the rules under expert testimony we'd also base it on the fact that such testimony would have little or not scientific validity.

THE COURT: I guess what you're referring to is what we see in some of these cases about child sexual abuse syndrome, or something, but that's sort of a collateral part of that syndrome, I suppose, not the whole- - whole thing, I guess the State would know whether they're gonna call somebody or not call somebody it's gettin' kind of late. Mr. Prosecutor?

It is interesting to note at this point that the State's attorney is Mr. Boggess, who knows practically zilch about the case. Further this hearing is exactly five days before trial.

MR. BOGGESS: Yeah, I'm not aware of any experts that have been mentioned in - - in regard to this, they would have - - there have been some recantations by the victims but - -

THE COURT: Yeah I'm familiar with that .(Pretrial

Transcript Pages 10-11)

Theses issues were well preserved by the Appellant's Counsel prior to the start of the actual trial as follows (Transcript Page 16):

THE COURT: Response?

MR. SMITH: Your Honor, we deny a good deal of what's been said, and you know we're not here to defend McDowell County charges, anything that happened in McDowell County was separate and distinct acts in which he would subject to punishment for in McDowell County courts, okay, this indictment doesn't protect him. You're talking about children being - - being beat, or whatever, you know this is very inflammatory material which is uncharged in the indictment, we haven't had any hearing on uncharged evidence as to whether it comes in. If he insulted somebody in Mercer County then that should be strong enough to stand on its own, and if it's not then we probably shouldn't be here, and what I'm suggesting to the Court is, that anything that happened in McDowell County that's - - that's uncharged misconduct here and it shouldn't be comin' into evidence and we would object.

The Trial Court was well aware that a 404 hearing should have been had prior to trial and the Trial Court stated as follows:

THE COURT: Well it would have been better if we could of fully developed this prior to trial and prior to bringing the jury in.

I don't think this is the classic collateral crimes type of evidence, however, it - - it seems, and the Supreme Court in at least two or three cases that I can remember, I'm sure they're more where they're getting into these matter, particularly in child sexual abuse cases and I think other cases totally unrelated to these, where they try to explain something, to explain to the jury. We've gotta keep in mind we've got twelve average people over there hearing and deciding this case and I - - I think we have to give 'em, you know the perspective of it, and I- - I don't see how we can keep allegations in McDowell County out-- out of this case as far as the sexual assault. I do believe, however, that the physical assaults there's - - there's been no charge of that in this matter and it seemed to me that it would be better not to make any reference to that in opening statements, not use that in your case in chief. If they challenge these witnesses, if they challenged these witnesses then- - then I think that that would be the appropriate time to bring it in.

Similarly the issues with respect to failure to disclose experts and their opinions was well preserved in the April 6, Pretrial hearing (Transcript Page 12):

MR. SMITH: Well like- - like I said, we would object to any expert testimony about how child sexual abuse victims always recant, and how that's part of some syndrome since none of that has been disclosed to us.

THE COURT: All I can say at this point is they- - the Chief Deputy (who is not Trial Counsel in this case) here is indicating that they don't intend to call anybody, if they change that I guess they've got a heavy burden to come in,- -

MR. SMITH: Yes sir.

THE COURT: - - of course I guess they could possibly put it on rebuttal, certainly they would be limited in their case in chief.

MR. SMITH: Yes sir.

THE COURT: I don't know, are you gonna put on any experts?

MR. SMITH: No sir.

Mr. Smith responded as such primarily because defense counsel is not put on notice of anything the state will offer.

THE COURT: Except, I guess, Doctor Wallace but he doesn't really give a lot of opinions about child sexual abuse syndrome, or anything like that.

MR. SMITH: He gives none, he says there's- - it didn't happen.

MR. BOGGESS: Now I'm not sure if this was a case where the children had been seeing any kind of counselor, or anything of that sort, but again I will find that out.

Notwithstanding the Pretrial hearing and Defense Counsels continued objection to recantation syndrome since no experts were disclosed, Defense Counsel was presented with this lovely tidbit from Counselor Shannon Beck (Transcript Page 313):

A. I don't – I'm not aware of that.

Q. Were you aware that she's made re-recantations?

A. Yes sir.

Q. From you perspective can recantations ever be believed?

A. Should they be believed?

Q, Yes ma'am?

A. Recantations are very common where children have been- - who have been abused.

Q. So according to you if they say they haven't been abused, they've been abused, and that they say they've been abused they've been abused, is that how that works?

A. Well usually with child sexual abuse when kids say it they usually don't lie about being sexually abused. Do kids tell stories, yes, they usually don't lie about being sexually abused becau- - and the reason you know that is because usually they have details that they can provide you, or- - and - - knowledge about sexual behavior, things of that nature that a child wouldn't have.

Counsel for Appellant feels that all of these issues regarding the testimony of Shannon Beck, Crystal Leedy and Shirley Aycoth should have been fully disclosed in writing pursuant to Rule 16 of the West Virginia Rule of Criminal Procedure well in advance of trial, and yet they were not despite repeated requests for same. Thereby, denying Defense Counsel the opportunity to secure experts to rebut their testimony.

ASSIGNMENTS OF ERROR AND RULINGS BELOW

1. The Circuit Court erred in not requiring the state to comply with the disclosure requirements of Rule 16 of the West Virginia Rules of Criminal Procedure.

2.. The Circuit Court erred in not holding Pretrial Hearings (after disclosure by the State, of which there was none) on other crimes, wrongs or acts for which the Petitioner was not indicted in violation of Rule 404 of the West Virginia Rules of Evidence.

LAW AND ARGUMENT

1. The Trial Court allowed the State to introduce the testimony of Shannon Beck, Crystal Leedy and Shirley Aycoth as expert witnesses over the objection of Petitioner, despite the fact that no disclosure was made by the State in violation of West Virginia Rule of Criminal Procedure, Rule 16, (a)(1)(E) which requires the State to:

> "disclose to the defendant a written summary of testimony the state intends to use under Rule 702, 703 or 705 of the Rules of Evidence during its case in chief at trial. The summary must describe the witnesses' opinions, the bases and reasons therefor, and the witnesses' qualifications."

It clearly appears from the facts of the case at bar that no disclosures as required by the above rule were available to the defense prior to trial in violation of the above referenced Rule of Criminal Procedure.

This rule is mandatory and hampered the defense at trial in that they did not know what to expect from these witnesses and clearly the nondisclosure did hamper preparation and presentation of the Petitioner's case. **See State ex rel. Rusen v. Hill, 1994, 454 S.E. 2d 427, 193 W.Va. 133.**

It further appears despite Defendant's motion for discovery, the pretrial order for discovery, and Defense counsel's objection at the Pretrial hearing on April 6, 2006, that no other conclusion can be reached than the state was acting in bad faith. **See Rusen**.

Obviously the testimony of the three above named witnesses were offered as expert testimony and damaged the Defense when evidence came in where recantations by child victims of sexual abuse cases are common. Beside the fact that this is not true, that it only happens in a small minority of sexual abuse cases, the defense was denied an opportunity to get a counter expert to rebut this type of evidence. Further,1 the trial court gave an expert witness instruction.

In a more recent case, **State of West Virginia v. Keenan, 584 S.E. 2d 191 W.Va. 2003,** this court addressed a similar issue regarding discovery requests and the prejudicial impact the state's non-disclosure can have on the outcome of the case.

This Court stated that the standard of review "for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case", in the case at bar the Appellant has clearly met and surpassed the requirements for this two-pronged analysis.

First, the State deliberately and with malice aforethought, foisted upon the Appellant at trial three expert witnesses namely Krystal Leedy, Shannon Beck and Shirley Aycoth, without prior disclosures as required by Rule 16 of the Wet Virginia Rules of Criminal Procedure. A further malignancy shown by the State during the discovery proceedings were representations in open court that there would be no expert testimony offered by the State. Especially, those opinions dealing with the predisposition of adolescent sexual abuse victims to recant prior claims of sexual abuse/assault.

Clearly, further, the defense was surprised by this at trial, and preserved the error on numerous occasions.

Second, the failure of the state to the disclose the required opinions as well as the basis therefore clearly hampered the defendant's presentation of the case at trial in that defense could hardly be said to be given ample opportunity to prepare a thorough cross examination of the state's expert witnesses under such circumstances. It should be fairly evident to this Court that Rule 16 was not complied with by the State. Appellant argues here that if not for non-compliance by the State with the rules on expert disclosures, resulted in him being convicted on four counts of the twenty-three count indictment.

Although it is alluded to that the State's response to the Appellant's Petition for Appeal that the State has an open file policy, that policy with regard to discovery, in and of itself does not comply with Rule 16. This Court has no idea what was disclosed by the State to the Appellant other than what has been introduced into evidence or alluded to in the testimony of witnesses. There may be many cases in which an open file policy will satisfy a defendant's discovery request. However, this is not one of them. Unless this court zealously enforces discovery rules in criminal cases, prosecutors across the state will take advantage in future non-disclosure cases. Perhaps, this court should consider some kind of procedure or rule whereby the discovery documents, tapes, cds, etc., should become a part of the record on appeal, perhaps again, by having both sides file with the trial court record sealed copies of the discovery documents. This procedure would allow this court, if it felt a necessity, to see exactly what was disclosed.

This Court, noted in **Keenan**, "that a defendant's constitutional rights are implicated when discovery fails and noted that discovery is one of the most important tools of criminal justice."; and

the Appellant argues here that this tool was broken in the case of State of West Virginia v. Harold Lee Cyrus. Counsel further argues here that the proceedings below were analogous to being given a garden trowel to dig a trench instead of a shovel .

WHEREFORE, Appellant prays that the Honorable Court will reverse Appellant's conviction and remand for new trial.

2. Rule 404(b) of the West Virginia Rules of Evidence provides: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excused pretrial notice on good cause shown, of the general nature of any such evidence it intend to introduce at trial.

The record is repleat with evidence of other crimes, wrongs or acts as is briefly touched upon in the statement of fact these include sexual assaults, whipping, beatings, for which the defendant was not charged with in this case. They also include evidence by direct testimony that the petitioner had his children taken away in an abuse and neglect proceeding which to the average person would mean he's done something wrong. As Shannon Leedy testified as a Child Protective Service Worker that:

> Q. Okay what is a Child Protective Service worker do?
>
> A. My job is a - - I work with Child Protective Services case management aspect so I work with cases where there has already been an investigation done where there has been abuse or neglect

substantiated in the home regarding children, and then I work in the home to help provide services to that family and to those children to insure safety and to help the family.

The Trial Court, failed to conduct any substantive balancing test to determine whether the proffered "other acts" allegedly committed by appellant was relevant and whether it's probative value was substantially out weighted by the danger of unfair prejudice, confusion of the issue, or misleading the jury. **See Roberts v. Consolidation Coal Co., 539 S. E. 2d 478, (W.Va. 2000)** and **State v. Parson, 589 S.E. 2d 226 (W.Va. 2003)**. It is apparent from the record that the trial court failed to engage in the balancing test as contemplated by the Rules of Evidence and by established case law. Clearly, the admission of the highly prejudicial alleged acts occurring in McDowell County and in the collateral abuse and neglect proceedings was highly prejidical and Appellant had no reasonable ground to anticipate that such evidence would be offered, since there was no Rule 404b hearing because the State never disclosed there would be 404b evidence offered**. See State v. Bunda, 419 S.E 2d 457 (W.Va. 1992)** and **State v. Nicholson, 252, SE.2d 894 (W.VA. 1979)**.

There can be no doubt that the jury drew conclusions from these statements and collateral acts that he must be guilty of something. This was briefly touched upon in the statement of fact that there was no disclosure by the state regarding 404(b) evidence and there was no pretrial evidentiary hearing on the matter to put defense counsel on notice that this kind of stuff was coming in. The trial court noted several times throughout the trial that the matters being discussed at the bench where matters that should have been dealt with prior to trial. It should be fairly clear to this Court that the fact that the state made no 404 (b)disclosures and made no disclosures as provided by Rule 16 of the West Virginia Rules of Criminal Procedure, that the state was acting in bad faith with a clear mind

to surprise the Defense and deny the Appellant a fair trial, which it succeeded in doing.

WHEREFORE, Appellant prays that this Honorable Court will reverse his conviction and remand the case for a new trial.

HAROLD LEE CYRUS,

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CERTIFICATE OF SERVICE

I, Phillip Scantlebury, counsel for Appellant, do hereby certify that I have served a true and correct copy of the foregoing Appellant's Brief upon Deborah Garton, Assistant Prosecuting Attorney, at her last known address of Mercer County Annex, 120 Scott Street, Ste. 200, Princeton, West Virginia 24740, and Dawn E. Warfield, Attorney General's Office- Capitol, Building 1, Rm. E-26; 1900 Kanawha Boulevard, East; Charleston, WV 25305, by United States mail, postage prepaid.

Dated this the 31st day of July, 2007.

Phillip Scantlebury

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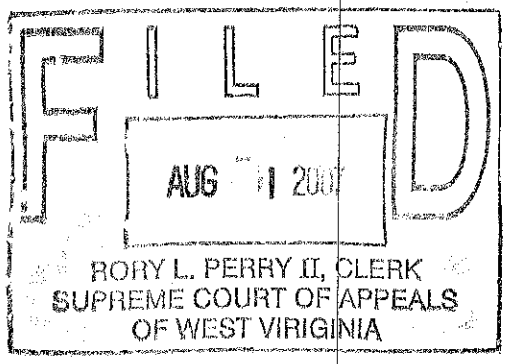

TABLE OF AUTHORITIES

CASE LAW